Supreme Court, U.S.
FILED
MAY 27 1993
OFFICE OF THE CLERK

No. 92-1921

In The

Supreme Court of the United States

October Term, 1992

MICHAEL E. AITSON,

Petitioner,

v.

LINDA C. CAMPBELL, JACKSON D. HARAWAY, WILLIAM E. GOODMAN, JOSEPH J. MASSAD, JAMES R. DOUGHERTY, LINDA H. COMBRINK, TERRY D. GRUBBS, JAY L. KRUSKA, JAMES D. LIMESTALL, FRED D. LUCAS, JR., PHYLLIS TURLINGTON, and CYNTHIA VOGLER-HENRY, individually and THE MEMBERS OF THE BOARD OF REGISTERED DENTISTS in their official capacities,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

When administrative licensing boards act to revoke or restrict professional licenses are they entitled to judicial immunity from liability under 42 U.S.C. § 1983?

If judicial immunity is potentially available to cover the action of administratively revoking a professional license, what elements must be established to demonstrate such an entitlement?

PARTIES

The caption contains all of the parties to the proceedings before the United States Court of Appeals for the Tenth Circuit and the United States District Court for the Western District of Oklahoma.

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MICHAEL E. AITSON,

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LINDA C. CAMPBELL, JACKSON D. HARAWAY, WILLIAM E. GOODMAN, JOSEPH J. MASSAD, JAMES R. DOUGHERTY, LINDA H. COMBRINK, TERRY D. GRUBBS, JAY L. KRUSKA, JAMES D. LIMESTALL, FRED D. LUCAS, JR., PHYLLIS TURLINGTON, and CYNTHIA VOGLER-HENRY, individually and THE MEMBERS OF THE BOARD OF REGISTERED DENTISTS in their official capacities,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Michael Aitson respectfully prays that a writ of certiorari be issued to review the March 1, 1993, order of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Order and Judgement of the Tenth Circuit of the United States Court of Appeals entered on March 1, 1993, is reprinted as Appendix A hereto.

The Memorandum Opinion and Order of the District Court entered on June 11, 1992, is reprinted as Appendix C hereto.

JURISDICTION

The opinion of the United States Court of Appeals for the Tenth Circuit was entered on March 1, 1993. This petition was filed within 90 days of the Order of the Tenth Circuit pursuant to Rule 13.1 of the Rules of the Supreme Court. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

The original action was one for deprivation of property (a dental license) without due process of law contrary to the protections of the 14th Amendment and made actionable by 42 U.S.C. § 1983. Jurisdiction was vested in the district court pursuant to 28 U.S.C. §§ 1331, 1343(a). Such order was a final order appealable of right pursuant to 28 U.S.C. § 1291. The initial appeal was perfected in accordance with Rule 4(a), F.R.A.P.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The following provisions of the United States Constitution and federal and state statutes are involved in the questions presented by this Petition.

CONSTITUTION OF THE UNITED STATES, Amendment 14, § 1:

§ 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Oklahoma Statutes, Title 59, Section 328.4 reprinted as Appendix D hereto.

Oklahoma Statutes, Title 59, Section 328.7 reprinted as Appendix E hereto.

Oklahoma Statutes, Title 59, Section 328.9 reprinted as Appendix F hereto.

Oklahoma Statutes, Title 59, Section 328.32 reprinted as Appendix G hereto.

STATEMENT OF THE CASE

The Petitioner is Michael Aitson, a person licensed as a dentist. The Respondents are members of the Board of Governors of Registered Dentists of the State of Oklahoma.

Dr. Aitson had been suspended by the Respondents (hereafter "Board") and was six months short of completing such suspension when the Board initiated proceedings to revoke his dental license. The Board did not give actual notice to Dr. Aitson but mailed the notice to Aitson's prior addresses. Despite the fact that no actual notice had been given and despite the fact that Dr. Aitson was still under suspension and there was no claimed emergency, the Board proceeded with the hearing and revoked Dr. Aitson's license.

When Dr. Aitson discovered that his license had been revoked without notice he first asked the Dental Board to rescind its action and, when the Board refused, commenced a civil rights action seeking damages and declaratory and injunctive relief for the violation of his property interest without due process of law.

The Board members moved to dismiss on various grounds including judicial immunity and Dr. Aitson moved for partial summary judgment. The trial court converted the Board's motion to dismiss into a motion for

summary judgment and entered an order dismissing Dr. Aitson's complaint.

Dr. Aitson appealed such judgment.

The Tenth Circuit reversed the dismissal of Plaintiff's lawsuit but affirmed the grant of judicial immunity to the Board and its members as an absolute bar to damages.

It is from this latter holding that Dr. Aitson seeks review via a writ of certiorari.

REASONS FOR GRANTING THE WRIT

The reasons for granting review of the District Court and Court of Appeals decisions in this case are as follows:

1. There is a split in the Circuits of the United States Court of Appeals regarding the question of whether administrative licensing boards are entitled to judicial immunity for the function of revoking or restricting licenses.

The Tenth Circuit in the instant case and in *Horwitz v. State Bd. of Medical Examiners,* 822 F.2d 1508 (10th Cir.), *cert. den.,* 484 U.S. 964 (1987) and the First Circuit in *Bettencourt v. Bd. of Reg. in Medicine,* 904 F.2d 722, 782-84 (1st Cir.1990) have used a functional analysis to support judicial immunity for the administrative function of revoking, suspending or otherwise affecting the right of a professional to practice his profession.

The Sixth Circuit in *Manion v. Michigan Bd. of Medicine,* 765 F.2d 590, 594-96 (6th Cir.1985) has concluded that

this action is not functionally equivalent to a court proceeding so as to warrant judicial immunity for the board members.

Thus, the rights of persons aggrieved by the actions of an administrative licensing board and the liability of the board members for such actions presently depend upon their place of residence. Since such issues arise from common constitutional principles, a common standard should exist by which such rights and liabilities can be uniformly determined.

2. The decision of the Tenth Circuit in this case and in its the published opinion of *Horwitz* and the decisions of the First Circuit in *Bettencourt* and the Sixth Circuit in *Manion* attempt to decide an important question which has not been addressed by this Court, to wit: The availability of absolute judicial to administrative licensing boards for the act of revoking or restricting a professional license.

This Court has not directly addressed such issue; however, this is an issue of substantial importance. The licensing of professionals by administrative boards is presently an area which engenders significant litigation and is an area where litigation is likely to increase in the future as the power of administrative boards increases. Besides the quantity of litigation, the importance of the subject matter – the right of a professional to practice in his field and his personal and professional reputation – is a matter of grave importance to the individual and to the public as well. This case represents an opportunity for the Court to speak clearly in an area where the stakes are high and the issues are critical.

3. In addressing the application of judicial immunity, all of the above referenced circuit courts have entered decisions in a way which conflicts with applicable decisions of this court, in that:

a. None of the circuits have considered the necessity or existence of a common-law basis of immunity for the function of an administrative licensing board revoking or restricting a license.

In *Burns v. Reed,* 500 U.S. ___, 114 L.Ed.2d 547, 571 (1991), the necessity of a common-law basis for absolute immunity was discussed as follows: "While we have not thought a common-law tradition (as of 1871) to be a sufficient condition for absolute immunity under § 1983 . . . we have thought it to be a *necessary* one" (Emphasis by the Court.)

Notwithstanding this explicit admonition, none of the circuits have considered whether there is a common-law justification for absolute immunity for the function of revoking or restricting a professional license. Petitioner would show that a proper analysis of the historical antecedents would establish that this function was only quasi-judicial and thus one for which only qualified immunity should be available. *See* 51 Am Jur2d, LICENSES, § 81, pg. 80 and 85 ALR 298, **Anno – Personal liability of public officer for refusing to grant an application for a license.**

Thus, the decision in the instant case conflicts with the recent pronouncements of this Court.

b. None of the circuits have considered the application of Cleavinger v. Saxner, 474 U.S. 193, 88 L.Ed.2d 507 (1985) in determining whether judicial immunity is appropriate.

In *Cleavinger* this Court explicitly held that performing an adjudicative function was not sufficient by itself to justify judicial immunity. Instead, a judge should further inquire as to whether that adjudicative function is being carried out in a judicial manner. *Cleavinger* applied six factors to be weighed in reaching this decision, however the Tenth Circuit has considered only the adjudicative nature of the function in determining the availability of immunity.

Indeed, none of the circuits have applied or even utilized all six of the *Cleavinger* factors in reaching their conflicting decisions. Therefore a clear statement from this Court as to the nature of the factors to be considered and the necessity for weighing such factors would appear to be necessary to guide the circuits in deciding questions of judicial immunity for administrative licensing boards.

c. The Tenth Circuit has not required the persons claiming judicial immunity to demonstrate their entitlement to such immunity.

In *Butz v. Economou*, 438 U.S. 478, 506, 57 L.Ed.2d 895, 916 (1978) this Court held that a person claiming any form of entitlement to absolute immunity was required to establish the basis for the same. The Tenth Circuit essentially shifted this burden from the claimant to the Petitioner: "Neither the record nor Plaintiff's brief contains any information on differences between *Horwitz* and the

present case that justifies distinguishing our precedent." (Slip Opinion, p. 8.) The record below reflects that Petitioner objected to the grant of absolute immunity because the Respondents had not made any showing of entitlement to that claim. The effect of the Tenth Circuit decision is therefore to shift the burden of proof from the claimant of the absolute immunity to the person contesting the claim. Thus, the decision of the Tenth Circuit is contrary to applicable precedent of this Court.

CONCLUSION

For the foregoing reasons, Petitioner asks this Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX "A"

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

MICHAEL E. AITSON, Plaintiff – Appellant, v. LINDA C. CAMPBELL, JACKSON D. HARAWAY, WILLIAM E. GOODMAN, JOSEPH J. MASSAD, JAMES R. DOUGHERTY, LINDY H. COMBRINK, TERRY D. GRUBBS, JAY L. KRUSKA, JAMES D. LIMESTALL, FRED D. LUCAS, JR., PHYLLIS TURLINGTON, CYNTHIA VOLGER-HENRY, individually, and MEMBERS OF THE BOARD OF REGISTERED DENTISTS in their official capacities, Defendants – Appellees.	)	No. 92-6247 (D.C. No. CV-92-204-C) (W. D. Oklahoma) (Filed March 1, 1993)

ORDER AND JUDGMENT[1]

Before McKAY, Chief Judge, SETH and BARRETT, Circuit Judges.

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[1] This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Defendants, who are responsible for the licensure of dentists in the state of Oklahoma, revoked Plaintiff's license. Plaintiff brought this action under 42 U.S.C. § 1983 (1988), claiming that the procedures that Defendants followed denied him due process. The district court granted summary judgment to defendants, and Plaintiff appeals. We affirm in part and reverse in part.

I

The record reveals that Plaintiff had a history of criminal and professional misconduct which caused defendants to place him on probation in 1987 and to extend the probation and suspend his license in 1988. Although he was given notice of the 1988 hearing at which his license was suspended, he did not appear. Under the terms of his 1988 probation, Plaintiff was required to undergo therapy for alcohol dependency and to keep Defendants, the members of the Oklahoma Board of Registered Dentists and its Executive Director, informed as to his current residential and work addresses.

While on both suspension and probation, Plaintiff pled guilty to driving under the influence of intoxicating liquor. Because he had a prior conviction for DUI, he was sentenced to one year in jail. Defendants subsequently

began proceedings to revoke Plaintiff's license. Notices were sent to his last known residence, as well as to his last known office address and two other locations where Defendants believed that Plaintiff might be found. All were returned to Defendants as undeliverable. The hearing proceeded without Plaintiff in attendance, and Defendants revoked his license.

Four months later, Plaintiff contacted the Board to inquire as to the status of his license. He claimed that he had verbally informed Defendant Linda Campbell, the Executive Director of the Board, that he was residing at his mother's residence in Woodward, Oklahoma. Ms. Campbell denied this and claimed that Plaintiff had never given her that address.

Plaintiff brought suit, claiming that the failure to give him notice of the hearing constituted a denial of due process. He seeks damages as well as declaratory and injunctive relief.

II

Plaintiff first claims that the district court erred in converting Defendant's motion to dismiss under Fed. R. Civ. P. 12(b)(6) into a motion for summary judgment under Fed. R. Civ. P. 56 without giving him the notice required by Fed. R. Civ. P. 56(c). We find no error.

"The notice of conversion of a Rule 12 motion to a Rule 56 motion and the consequences of a failure to notify are serious business." *Prospero Assocs. v. Burroughs Corp.*, 714 F.2d 1022, 1028 (10th Cir. 1983) (McKay, J., dissenting). However, the requirement of notice is not absolute.

"[F]ailure to give notice is not reversible error if a party does not attempt to exclude supporting documents, but files its own sworn affidavits in response." *Nichols v. United States*, 796 F.2d 361, 364 (10th. Cir. 1986).

This case comes under the *Nichols* exception. Defendants attached several evidentiary exhibits to their motion to dismiss, including a copy of the Board's order revoking Plaintiff's license and a copy of the Board's rules of procedure. This was improper, as "[t]he court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Miller v. Glanz*, 948 F.2d 1562, 1565 (10th Cir. 1991). Nevertheless, Plaintiff did not move to exclude these exhibits. He also presented no arguments regarding the legal sufficiency of his complaint standing alone. Rather, Plaintiff responded to Defendants' 12(b)(6) motion with a motion for summary judgment and attached an affidavit.[2] Because this case falls squarely under *Nichols*, we find no error.

III

Plaintiff next argues that the district court erred in entering summary judgment on the notice issue. Because

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[2] Plaintiff explained that using his motion for summary judgment as his response to Defendants' 12(b)(6) motion was "the most judicially efficient method of addressing these issues." (Appellant's App., Doc. 5 at 2-3.)

we find that the district court improperly made a credibility determination on a summary judgment motion, we agree.

This issue is controlled by *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306 (1950), under which Plaintiff is entitled to "notice reasonably calculated, under all the circumstances, to apprise [him] of the pendency of the action and afford [him] an opportunity to present [his] objections." *Id.* at 314. We agree with Plaintiff that if the Board was aware of his new address, its failure to send notice to him at that address violates *Mullane*. The central issue in this case therefore is the date when Plaintiff informed Ms. Campbell that he could be reached at his mother's residence. In his affidavit, Plaintiff alleges the following: "I had personally advised Linda Campbell of my permanent mailing address in Woodward. Had Ms. Campbell mailed notice to that address I would have received the same and been aware of the hearings. Ms. Campbell made no effort to mail notice to my permanent address." (Appellant's App., Doc. 5, Pl.'s Aff. at ¶ 5.) In her counter-affidavit Ms. Campbell states, "[Plaintiff] had not previously informed the Board that he had a permanent address in Woodward. . . . At the time that notice was sent to [Plaintiff] regarding the . . . hearing at which his license was revoked, Board records did not indicate that [Plaintiff] could be reached at a Woodward address." (Appellant's App., Doc. 6, Ex. C at ¶¶ 6-7.)

These contradictory affidavits can only be resolved through a credibility determination. While Plaintiff's affidavit is somewhat vague, it does clearly allege that he informed Ms. Campbell of the Woodward address prior to the time the notices were sent. Ms. Campbell's affidavit

unequivocally denies this. If Plaintiff is correct, the failure to provide him with notice at that address is a violation of *Mullane.*

This conflict cannot be resolved on summary judgment. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. . . . The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

It is clear that the district court did not follow *Anderson* in granting summary judgment. The court clearly did not believe the allegations of Plaintiff, the non-movant, but rather stated that "[t]he Court further finds that it was not until May of 1991 – four months after the hearing – that [Plaintiff] verbally informed the board that he could have been reached . . . in Woodward." (Appellant's App., Doc. 7 at 10.) The court further stated that "[b]ut for [Plaintiff's] failure to keep the Board notified of his current address and phone numbers, [Plaintiff] would have received actual notice." (*Id.* at 9.)

The district court also concluded that Plaintiff's affidavit was deficient because it was conclusory, because it did not contain written documentation supporting its claims, and because it failed to specify the date when he orally informed the Board of his new address. We are not persuaded. The affidavit, while vague, was sufficient to allege the specific fact on which Plaintiff's case rests – that Plaintiff informed the Board of his new address prior to the mailing of the notices. It is not necessary for Plaintiff to recall the exact date on which this occurred,

and it is not realistic to expect a litigant to produce written documentation of an oral notification.

We therefore conclude that Plaintiff's affidavit did allege facts which would support a claim for a failure to give proper notice.[3] We REVERSE the trial court's granting of summary judgment on this ground.

IV

The district court also granted summary judgment to the members of the Board (all Defendants except Ms. Campbell) on the basis of absolute immunity, based on this court's decision in *Horwitz v. State Bd. of Medical Examiners,* 822 F.2d 1508 (10th Cir.), *cert. denied,* 484 U.S. 964 (1987). Plaintiff argues that *Horwitz* is superceded by the Supreme Court's intervening decision in *Burns v. Reed,* 111 S. Ct. 1934 (1991). We disagree. *Burns* dealt with the immunity of prosecutors in various contexts, not with licensing boards. It announced no new general principles that are relevant in this context. We see nothing in *Burns* that causes us to reconsider *Horwitz.*

Plaintiff also argues that *Horwitz* is not controlling, because we must examine each licensing board individually. While we agree with the general proposition, it does not help Plaintiff's case. Neither the record nor Plaintiff's brief contains any information on differences between

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[3] Of course, we express no opinion as to whether Plaintiff's alleged oral notification was sufficient to fulfill his probationary duty to keep the Board informed of his whereabouts. We merely find that it was sufficient to make out a due process claim for failure to give reasonable notice.

Horwitz and the present case that justifies distinguishing our precedent. Rather, Plaintiff's brief essentially argues that *Horwitz* was wrongly decided. Because we decline to reconsider *Horwitz*, we AFFIRM the grant of summary judgment to the individual members of the Board on the basis of absolute immunity under § 1983.[4]

V

The district court also granted absolute immunity to Ms. Campbell because of her position as Executive Director of the Board. Plaintiff claims that the failure of Ms. Campbell to ask for absolute immunity (she only sought qualified immunity) bars the district court from granting it *sua sponte*. We agree.

District courts "possess the power to enter summary judgments *sua sponte*, so long as the losing party was on notice that she had to come forward with all of her evidence." *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986). That was not the case here. The question of absolute immunity for non-judicial officials is a complex one that frequently turns on factual details. For example, the question may turn on whether Ms. Campbell, in mailing the notices, is best described as "acting as an advocate for the State" or as "carrying out administrative or investigative functions." *Kadivar v. Stone*, 804 F.2d 635, 637 (11th. Cir. 1986); *see also Coleman v. Turpen*, 697 F.2d 1341, 1346 (10th Cir. 1982) (per curiam) (prosecutor has only qualified immunity because he was acting "as an administrator, not

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[4] Of course, they remain amenable to suit in their official capacities for declaratory and injunctive relief.

as an advocate"). Defendants' motion to dismiss (converted by the court into a motion for summary judgment), as well as Plaintiff's response, did not discuss the details of Ms. Campbell's role, but rather focused entirely on the sufficiency of the qualified immunity defense. Under these circumstances, Plaintiff had no notice that he was to come forward with evidence on Ms. Campbell's role or present an affidavit under Fed. R. Civ. P. 56(f) stating that he required more discovery to address the issue. We REVERSE the grant of absolute immunity to Defendant Campbell.

VI

Finally, the district court stated in the alternative that even if Ms. Campbell has only qualified immunity, that forms a valid defense to Plaintiff's allegations. We do not agree. The doctrine of qualified immunity does not protect those who violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). It is well established that Plaintiff is entitled to "notice reasonably calculated, under all the circumstances, to apprise [him] of the pendency of the action and afford [him] an opportunity to present [his] objections." *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306, 314 (1950). If Plaintiff's claim that he orally informed Ms. Campbell of his new address is true, qualified immunity does not shield her from liability for her failure to notify him of the hearing at that address. We REVERSE the grant of summary judgment to Defendant Campbell on the basis of qualified immunity.

VII

We REVERSE the grant of summary judgment to all Defendants on the merits. We AFFIRM the grant of summary judgment to every individual Defendant other than Linda Campbell on the basis of absolute immunity. We REVERSE the grant of summary judgment to Defendant Campbell on the basis of absolute or qualified immunity. We REMAND for further proceedings consistent with this opinion.

Entered for the Court

Monroe G. McKay
Chief Judge

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

MICHAEL E. AITSON, Plaintiff, v. LINDA C. CAMPBELL, JACKSON D. HARAWAY, WILLIAM E. GOODMAN, JOSEPH J. MASSAD, JAMES R. DOUGHERTY, LINDY H. COMBRINK, TERRY D. GRUBBS, JAY L. KRUSKA, JAMES D. LIMESTALL, FRED R. LUCAS, JR., PHYLLIS TURLINGTON, and CYNTHIA VOGLER-HENRY, individually and THE MEMBERS OF THE BOARD OF REGISTERED DENTISTS in their official capacities, Defendants.	)	Case No. CIV-92-204-C (Filed July 9 1992)

NOTICE OF APPEAL

COMES NOW the Plaintiff, Michael E. Aitson, in the above captioned action and hereby appeals from that portion of the Memorandum Opinion and Order dated and filed June 11, 1992, which enters judgment in favor of Linda C. Campbell, Jackson D. Haraway, William G. Goodman, Joseph J. Massad, James R. Dougherty, Lindy H. Combrink, Terry D. Grubbs, Jay L. Kruska, James D. Limestall, Fred R. Lucas, Jr., Phyllis Turlington and

Cynthia Vogler-Henry, individually and The Members of the Board of Registered Dentists in their official capacity and against the Plaintiff, Michael E. Aitson.

Respectfully submitted this 9th day of July, 1992.

/s/ Mark Hammons,
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CERTIFICATE OF MAILING

A true copy of the foregoing was mailed postage prepaid to opposing counsel on the same date as its filing with this Court to the following attorneys: Susan Brimer Loving, Attorney General of Oklahoma and Rebindranath Ramana, Assistant Attorney General, OBA #12045, 2300 North Lincoln Blvd., State Capital Building, Room 112, Oklahoma City, Oklahoma 73105-4894 (405) 5521-3921, Attorneys for the Defendants.

/s/ Mark Hammons

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

MICHAEL E. AITSON,

Plaintiff,

v.

LINDA C. CAMPBELL, JACKSON D. HARAWAY, WILLIAM E. GOODMAN, JOSEPH J. MASSAD, JAMES R. DOUGHERTY, LINDY H. COMBRINK, TERRY D. GRUBBS, JAY L. KRUSKA, JAMES D. LIMESTALL, FRED R. LUCAS, JR., PHYLLIS TURLINGTON, and CYNTHIA VOGLER-HENRY, individually and THE MEMBERS OF THE BOARD OF REGISTERED DENTISTS in their official capacities,

Defendants.

No. CIV-92-204-C
(Filed
June 11 1992)

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

At issue is defendants' motion to dismiss filed February 24, 1991. Plaintiff Michael E. Aitson responded on

March 9, 1992, and also filed a motion for partial summary judgment that date. Defendants responded on April 3, 1992. Because matters outside the pleadings have been presented to the Court and not excluded, the defendants' motion to dismiss shall be converted to one for summary judgment, and the Court shall consider the pleadings as cross-motions for summary judgment. *See* Fed. R. Civ. P. 12(b)(6) & 56. Aitson has had adequate opportunity to respond to defendants' motion for summary judgment due to the posture of these motions.

This action concerns the January 1991 revocation of plaintiff Aitson's license to practice dentistry. The Oklahoma Board of Governors of Registered Dentists (the "Board") held a hearing regarding the allegation that Aitson violated a previous order of probation issued by the Board. *See* 59 Okla. Stat. §§ 328.15 (powers and duties of Board of Governors) & .32 (license revocation procedures). Aitson contends that he was not given actual notice of the Board hearing and has brought two claims for relief pursuant to 42 U.S.C. § 1983 and the Fifth and Fourteenth Amendments: 1) a claim against defendants individually for damages based on an alleged due process violation; and 2) a claim for declaratory and injunctive relief that would prohibit enforcement of the Board's license revocation order.

II. STANDARD FOR SUMMARY JUDGMENT

The facts presented to the Court upon a motion for summary judgment must be construed in a light most favorable to the nonmoving party. *Board of Educ. v. Pico*, 457 U.S. 853, 864 (1982); *United States v. Diebold, Inc.*, 369

U.S. 654 (1962). If there can be but one reasonable conclusion as to the material facts, summary judgment is appropriate. Only genuine disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Finally, the movant must show entitlement to judgment as a matter of law. *Ellis v. El Paso Natural Gas Co.*, 754 F.2d 884, 885 (10th Cir. 1985); Fed. R. Civ. P. 56(c).

Although the Court must view the facts and inferences drawn from the record in a light most favorable to the nonmoving party, "even under this standard there are cases where the evidence is so weak that the case does not raise a genuine issue of fact." *Burnette v. Dow Chem. Co.*, 849 F.2d 1269, 1273 (10th Cir. 1988). As stated by the Supreme Court, "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action.' " *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (quoting Fed. R. Civ. P. 1).

The Supreme Court articulated the standard to be used in summary judgment cases, emphasizing the "requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 248 (emphasis in original). A dispute is "genuine" "if a reasonable jury could return a verdict for the nonmoving party." *Id.* The Court stated that the question is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251-52. "The mere existence of a scintilla of evidence in support of the

[party's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [party]." *Id.* at 252. an appellate court in reviewing a grant of summary judgment is " 'not limited to the grounds upon which the trial court relied but may base summary judgment on any proper grounds found in the record to permit conclusions of law.' " *Awbrey v. Pennzoil Co.*, ___ F.2d ___, ___, 1992 U.S. App. LEXIS 6622 at *6 (10th Cir. Apr. 7, 1992) (quoting *City of Chanute, Kan. v. Williams Natural Gas Co.*, 955 F.2d 641, ___ (10th Cir. 1992) (citing *United States v. Colorado*, 872 F.2d 338, 339 (10th Cir. 1989))).

III. BACKGROUND FACTS

Plaintiff Michael Aitson formerly held license number 4010, which authorized him to practice dentistry in the State of Oklahoma. On August 22, 1987, Aitson was placed on professional licensure probation by the Oklahoma Board of Governors of Registered Dentists (the "Board") for four years due to receiving two felony convictions for attempting to bribe a police officer. As a condition of this probation, Aitson was required to attend Alcoholics Anonymous. Aitson not only allegedly violated this probation, but the Board also received complaints of neglect from Aitson's patients, and therefore two separate disciplinary actions were filed against Aitson.

Subsequently, a hearing was held on July 22, 1988, and Aitson did not attend despite being given personal notice. At that hearing, in Board Case Number 281, Aitson was found guilty of dishonorable or unprofessional

conduct for abandoning patients and was suspended from the practice of dentistry in the State of Oklahoma for three years beginning July 22, 1988. Also at another hearing held July 22, 1988, in Board Case Number 287, Aitson was found to have violated the conditions of his 1987 probation by not attending Alcoholics Anonymous and his probation was extended for three more years. One condition of Aitson's new probation was for Aitson to keep the Board informed of his current residential and work addresses and phone numbers. Another condition of the order was that if it was brought to the Board's attention that Aitson was in violation of the material conditions of his probation, then the Board would give Aitson at least 20 days notice by certified mail to his last-known address to appear and show cause why he should not be found to be in violation of his conditions of probation.

Thereafter, on January 2, 1990, Aitson pled guilty in Oklahoma County District Court to driving under the influence of intoxicating liquor after a former conviction of driving under the influence of intoxicating liquor in case number CRF 89-002662. Aitson was sentenced to one year in jail. This guilty plea violated one of the material conditions of the Order of Probation entered by the Board on July 22, 1988. Service by certified mail to Aitson's last-known addresses was attempted by the Board, but Aitson did not appear at the January 2, 1990 hearing and his license was revoked.

IV. ANALYSIS

The court finds that defendants' motion to dismiss, having been converted to one for summary judgment,

should be granted. The doctrine of quasi-judicial, absolute immunity bars plaintiff's claim against all Board-member defendants in their individual capacities for damages based on the alleged due process violation. *See Horwitz v. Board of Medical Examiners,* 822 F.2d 1508, 1514-15 (10th Cir.), *cert. denied,* 484 U.S. 964 (1987); *Bettencourt v. Board of Registration in Medicine,* 904 F.2d 772, 781-84 (1st Cir. 1990); *Clulow v. State of Okla.,* 700 F.2d 1291, 1298 (10th Cir. 1983) (holding that Oklahoma Bar Association officials have absolute immunity in fulfilling statutory duties of investigation, preparation, and presentation of cases involving attorney discipline), *overruled on other grounds, Wilson v. Garcia,* 731 F.2d 640 (10th Cir. 1984) (en banc), *aff'd,* 471 U.S. 261 (1985). Plaintiff recognizes that this is the law of this Circuit, but has unpersuasively urged this Court to conclude otherwise. The Board members perform statutory duties that are both adjudicatory and prosecutorial in nature. These duties are for the public in good and must be performed without harassment or intimidation. *See Horwitz v. Board of Medical Examiners,* 822 F.2d at 1515; 59 Okla. Stat. § 328.2. The Board members' actions are likely to result in lawsuits for damages by disciplined licensees, and sufficient safeguards exist in the regulatory framework to control unconstitutional conduct or correct any deficiencies. *See Horwitz v. Board of Medical Examiners,* 822 F.2d at 1513; *Bettencourt v. Board of Registration in Medicine,* 904 F.2d at 783.

The remaining defendant, Linda C. Campbell, is the Board's Executive Director and serves pursuant to statute as an ex officio staff member and administrative officer to the Board. *See* 59 Okla. Stat. § 328.14. The Executive

Director is responsible to the Board to perform all delegated administrative functions. *Id.* Aitson contends that Campbell prepared and issued the notices of the hearing and recommended the revocation. These duties are in the nature of a prosecutorial role. Campbell denies she actually recommended the revocation, but the facts, when viewed in a light most favorable to Aitson, actually work against him on this issue. Although defendants argue that Campbell is entitled only to qualified immunity, the Court concludes, instead, that she is entitled to quasi-judicial, absolute immunity like that of the Board members. *See Horwitz v. Board of Medical Examiners,* 822 F.2d at 1514-15; *Bettencourt v. Board of Registration in Medicine,* 904 F.2d at 784-85.

Alternatively, the Court holds that if Campbell is entitled to only qualified immunity then she is entitled to immunity from suit in her individual capacity based on that defense as well. Campbell followed clearly established law and provided Aitson with reasonable notice at his last-known address. All defendants were acting within the scope of their lawful authority when Aitson's license was revoked, and summary judgment should be entered for them on damages. The Court notes that plaintiff did not appeal the due process issue in state district court and then to the Oklahoma Supreme Court, but instead elected to file this civil rights suit. *See* 59 Okla. Stat. § 328-43 (appeals).

What remains then is plaintiff's claim for declaratory and injunctive relief that seeks to prohibit enforcement of the dentist's license revocation order. The finding of absolute immunity from damages does not bar Aitson's claims

to declaratory and injunctive relief. *See Horwitz v. Board of Medical Examiners,* 822 F.2d at 1513.

Pursuant to statute, the Board was required to give Aitson reasonable notice of the revocation hearing. *See* 59 Okla. Stat. § 328.45 (notice and opportunity to defend). Pursuant to the Board's Probation Order of July 22, 1988, Aitson was placed under an affirmative obligation to provide the Board with his current address for the express purpose of notifying Aitson in the event of a future disciplinary hearing. The very reason for this extraordinary measure was the fact that Aitson failed to appear at disciplinary hearings in the past. On November 9, 1991, the Board sent notice to 5408 North Harvey, "A", Oklahoma City, Oklahoma 73118, which was Aitson's last-known residence address according to Board records. The mailing was returned unclaimed to the Board with the notation that forwarding expired on November 10, 1990 – a year earlier.

Also on November 9, 1991, the Board mailed notice to 5100 North Brookline, #425, Oklahoma City, Oklahoma 73112, which was Aitson's last-known office address. This mailing was returned with a check mark noting "Attempted – not known." The Court finds that Aitson failed to meet his probationary obligation to keep the Board apprised of his current residential and office addresses. The Board also sent notices to two other addresses that were suspected to be Aitson's current address; one was the address where in the past Aitson had asked for his diploma to be sent, and the other address was provided by the State Probation Office, which Aitson gave when he was arrested for driving under the influence in Scottsdale, Arizona. Public Rule 3

of the Board's Rules and Regulations provides that notice of a hearing shall be mailed by certified mail to the last-known residence, and this procedure was reasonably and diligently followed. *See Tulsa Professional Collection Servs., Inc. v. Pope*, 485 U.S. 478, 484 (1988) ("[w]hether a particular method of notice is reasonable depends on the particular circumstances."). Impracticable and extended searches in the name of due process are not required. *Id.* at 490 (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 317-18 (1950)). "We have repeatedly recognized that mail service is an inexpensive and efficient mechanism that is reasonably calculated to provide actual notice." *Tulsa Professional Collection Servs., Inc. v. Pope*, 485 U.S. at 490.

The Court finds that Aitson failed on multiple occasions to meet his probationary obligation to keep the Board apprised of his current residential and office addresses and change of phone numbers. The Board complied in every reasonable manner to provide Aitson with actual notice. But for Aitson's failure to keep the Board notified of his current addresses and phone numbers, Aitson would have received actual notice.

The Court concludes that defendants provided Aitson with all the process that was due and it was Aitson's own actions and omissions, not those of the Board, that led to Aitson's failure to receive notice of his revocation hearing. Aitson cannot be heard to complaint of a violation of his constitutional rights when it was he who failed to meet his responsibilities to assure that he would receive actual notice. On a previous occasion, Aitson failed to even attend his disciplinary hearing after he

received personal notice. Aitson was only entitled to reasonable notice and he waived his right to actual notice. *Cf. Mennonite Bd. of Missions v. Adams,* 462 U.S. 791, 795-97 (1983) (holding that notice by publication offended due process when more effective means such as mailed notice were available that were reasonably calculated to provide actual notice).

The Court further finds that it was not until May of 1991 – four months after the hearing – that Aitson verbally informed the Board that he could have been reached at his mother's address in Woodward, Oklahoma. It is reasonable to expect a licensed professional to send written notice of office and residence address changes in order to verify a condition of probation, and Aitson does not come forward with copies of any such letters, nor does he even allege that they exist.

In an affidavit, Aitson makes the following conclusionary statement: "I had personally advised Linda Campbell of my permanent mailing address in Woodward. Had Ms. Campbell mailed notice to that address I would have received the same and been aware of the hearings. Ms. Campbell made no effort to mail notice to my permanent address." Aitson's brief at App. 1, ¶ 5 (Mar. 9, 1992). Aitson indirectly implies that this oral "advice" was before the January 1991 hearing, although he leaves this fact sufficiently ambiguous. However, Aitson has not provided the Court with copies of any written documents that might support such a contention; Aitson has also failed to provide specific dates or times of his oral advice to the Board of his change of address or other material particulars in support of the conclusionary statements in his affidavit. *Cf.* Defendants' brief at Ex. C.

¶ 6 (Apr. 3, 1992) (affidavit of Linda C. Campbell stating that in May 1991, Aitson appeared at the Dental Board of inquire about his licensure status, and at that time he stated that he could have been reached at his mother's address in Woodward, Oklahoma, although he did not actually provide that address until later in an application for relicensure that was subsequently filed). Aitson does not contend that he notified the Board, as ordered, of any of his other changes of office and residence addresses and phone numbers. Aitson's affidavit is conclusionary at best, and conclusionary affidavits are insufficient to overcome summary judgment. *See Lake Hefner Open Space Alliance v. Dole*, 871 F.2d 943, 945-46 (10th Cir. 1989) (Plaintiff did not "by affidavits or as otherwise . . . set forth *specific* facts showing that there is a genuine issue for trial." (emphasis supplied)). When assessing the evidence, but not weighing it, the Court is only required to draw reasonable inferences from the record. *See Lucas v. Dover Corp., Norris Div.*, 857 F.2d 1397, 1400 (10th Cir. 1988) (JNOV [recently revised to judgment as a Matter Of Law] standard). Implausible inferences can be rejected. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. at 585-98 (rejecting implausible inference of intent in antitrust conspiracy claim).

A party resisting a motion for summary judgment must do more than make conclusionary allegations; it "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *Dart Indus. v. Plunkett Co.*, 704 F.2d 496, 498 (10th Cir. 1983). "The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Matsushita Elec.*

Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (quoting Advisory Committee Note to Fed. R. Civ. P. 56(e)).

The Court determines whether the nonmovant has submitted evidence of the essential elements of the claim by viewing "the evidence presented through the prism of the substantive evidentiary burden." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 254. At trial, Aitson would have to prove his due process claim by a preponderance of the evidence. That burden is not met now and cannot be met at trial.

The Supreme Court imposes a burden on a plaintiff who bears the burden of proof at trial. Once the defendant points out the absence of evidence in the record creating a "genuine issue" about a "material fact," the plaintiff "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. at 586. The plaintiff must set forth specific facts showing there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 248. Summary judgment should be granted to defendants on all claims.

IV. CONCLUSION

Accordingly, defendants' motion for summary judgment is GRANTED. Plaintiff's motion for partial summary judgment is DENIED. A separate judgment shall be entered separately. This case is STRICKEN from this Court's trial docket.

IT IS SO ORDERED THIS 11 DAY OF JUNE 1992.

/s/ Robin J. Cauthron
ROBIN J. CAUTHRON
UNITED STATES
DISTRICT JUDGE

ENTERED IN JUDGMENT
DOCKET ON 6-11-92

APPENDIX "D"

§ 328.4. The Registered Dentists of Oklahoma – Seal – Powers

There is hereby constituted an organization to be known as "the Registered Dentists of Oklahoma," hereinafter designated as "the organization," which shall have a seal and may sue and be sued, and which may, for the purpose of carrying into effect and promoting the objects of said organization, employ independent attorneys; may seek the advice and assistance of the Attorney General's office of the State of Oklahoma, inspectors, and investigators for the purpose of advising and assisting it in the enforcement of this act;[1] may enter into contracts; and may acquire, hold, encumber and dispose of such real and personal property as is necessary thereto. Laws 1970, c. 173, § 4, eff. July 1, 1970.

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[1] Section 328.1 et seq. of this title.

APPENDIX E

§ 328.7. Board of Governors – Membership – Tenure – Travel expenses – Affiliations

There is hereby constituted a Board of Governors of the organization to be known as "The Board of Governors of the Registered Dentists of Oklahoma", consisting of eight (8) dentist members, one (1) dental hygienist member and two (2) members who shall represent the public in general. One dentist member shall be elected from each of the eight districts. One dental hygienist member shall be elected by dental hygienists residing in the State of Oklahoma who are legally licensed to practice dental hygiene therein. The two public representative members shall be appointed by the Governor, subject to confirmation by the Senate. The members representing the public may not be dentists, dental surgeons, dental hygienists or dental technicians, or be related by blood or marriage within the third degree to any such person. Each member shall hold office for a period of three (3) years and until his/her term expires and/or his/her successor is selected and qualified. Board members shall not serve for more than three (3) consecutive terms. However, upon this act becoming effective, the present members of the Board of Governors shall hold office until their terms expire and/or their successors are elected and qualified as hereinafter provided. The members of the Board of Governors shall be reimbursed for travel expenses as provided in the State Travel Reimbursement Act.[2] The Board of Governors, at its discretion, may affiliate with the American Association of Dental Examiners as an active member and

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[2] Section 500.1 et seq. of title 74.

pay regular dues to said association and may send no more than two board members as delegates to regular meetings thereof.

Laws 1970, c. 173, § 7, eff. July 1, 1970. Laws 1979, c. 58, § 1, eff. April 10, 1979; Laws 1985, c. 178, § 30, operative July 1, 1985.

APPENDIX "F"

§ 328.9. Nomination and election of Board members – Removal from office

Nominations for dentist members of the Board of Governors from the several districts shall be by petition signed by at least ten members entitled to vote for such nominees. Nominations for the dental hygienist member of the Board of Governors shall be by petition signed by at least ten dental hygienists entitled to vote for such nominees. The election shall be by ballot. The ballots shall be mailed to those entitled to vote at least thirty (30) days prior to the date of canvassing the ballots and shall be returned by mail to the secretary and the ballots shall be opened and canvassed at a meeting of the Board. In other respects, the election shall be as the board may by rule direct. Only members of the organization residing in the respective districts shall be entitled to vote for the dentist members therefrom. Only dental hygienists residing and licensed in the State of Oklahoma shall be entitled to vote for the dental hygienists member. Dentist members of the Board of Governors may be removed from office by special election called by the Board of Governors upon receipt of a written petition signed by at least twenty percent (20%) of the members residing in that district. The dental hygienist member of the Board of Governors may be removed from office by special election called by the Board of Governors upon receipt of a written petition signed by at least twenty percent (20%) of the licensed dental hygienists residing in the State of Oklahoma. If a majority of the votes cast in the special election are in favor of recalling the board members, he/she will be removed from office as of the date the results

of the ballot convassing are forwarded to the Board of Governors.

Laws 1970, c. 173, § 9, eff. July 1, 1970. Laws 1979, c. 58, § 2, eff. April 10, 1979.

APPENDIX "G"

§ 328.32. Revocation or suspension of license to practice dentistry

The Board of Governors shall have power, after a hearing for any causes now existing in the laws of the State of Oklahoma, or for a violation of any acts prohibited herein, to revoke a license of a dentist to practice dentistry, or a specialist license of a dentist, or to suspend the use of the same, or to discipline by probation or reprimand, public or private; and the Board of Governors shall have power to pass upon all petitions for reinstatement. The Board of Governors shall keep a record of the evidence and proceedings in all matters involving the revocation of a license or suspension, probation or reprimand, and shall make findings of fact and a decision thereon. Upon the making of any decision to revoke a license or to suspend a member hereof from practice, or place him or his license under probation, or reprimand a member hereof, the Board of Governors shall immediately forward a certified copy of said decision to the member involved by registered mail, to his last-known business address. Such decision shall be final, unless such member hereof whose license is revoked, suspended, placed under probation, or who is reprimanded, shall have the right of an appeal as provided in this act. In the event an appeal is not taken within the provisions of this act, the Board of Governors shall make and enter an order striking the name of such person from the roll of membership hereof, or suspending him for the period mentioned in said decision or otherwise carrying out provisions of said decision and shall so notify said member thereof. The Board of Governors shall have power to

revoke the license of a member hereof, suspend the member from the practice, reprimand or order a period of probation of said member upon the following grounds:

(a) Upon presentation to the Board of Governors of a certified copy of a court record showing that the member hereof has been convicted of a crime involving turpitude;

(b) Has presented to the Board of Governors a false diploma, license or certificate, or one obtained by fraud or illegal means;

(c) By reason of persistent inebriety, or addiction to drugs, the member is rendered incompetent to continue the practice of dentistry;

(d) Has been guilty of false, fraudulent or misleading advertising, as herein prohibited;

(e) Has permitted, directly or indirectly, by knowledge or acquiescence, an unregistered or unlicensed person to practice dentistry and/or dental hygiene;

(f) Has permitted a dental hygienist to perform any operation other than as authorized by the Board of Governors;

(g) Has been guilty of dishonorable or unprofessional conduct;

(h) Has failed to pay registration fee as herein provided;

(i) Holds himself out as especially qualified in or limiting his practice to a branch of dentistry without a special license therefor;

(j) Is a menace to the public health by reason of a communicable disease;

(k) Is a menace to the public health by reasons of unsanitary offices, practices, or techniques;

(*l*) Has been proven mentally unsound or has been admitted to a mental institution, either public or private, and until he is proven mentally competent;

(m) Is grossly immoral;

(n) Is incompetent in the practice of dentistry;

(*o*) Is guilty of willful negligence in the practice of dentistry;

(p) Is guilty of division of fees, or agreeing to split or divide the fee received for dental service with any person for bringing or referring a patient without the knowledge of the patient or his legal representative;

(q) Has been convicted of violating or has willfully violated the federal or state narcotic or barbiturate laws or has been committed for treatment for drug addiction to an institution, either public or private, and until he has proven himself cured;

(r) Is guilty of using or attempting to use the services of a dental laboratory or dental laboratory technician without issuing a written authorization;

(s) Is guilty of aiding or abetting or encouraging a dental hygienist employed by him to make use of an oral prophylaxis list, or the calling by telephone or by use of letters transmitted through the mails to solicit patronage from patients formerly served in the office of any dentist formerly employing such hygienist;

(t) Is guilty of having more than two dental hygienists per dentist;

(u) Is guilty of patronizing or using the services of any dental laboratory or dental laboratory technician in this state unless such dental laboratory or dental laboratory technician shall have first complied with the provisions of the act regulating dental laboratories and dental laboratory technicians;

(v) Has placed a dental appliance in the mouth without first having a written authorization from the dentist who caused same to be constructed;

(w) Has authorized, permitted or allowed his or her dental hygienist, dental nurse, dental assistant, or dental laboratory technician to violate any provision of this act or any rules and regulations of the Board of Governors, or has violated any of the provisions of this act[1].

Laws 1970, c. 173, § 32, eff. July 1, 1970.

* * *

[1] Section 328.1 et seq. of this title.

Supreme Court, U.S.
FILED
JUL 1 1993
OFFICE OF THE CLERK

No. 92-1921

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1992

MICHAEL E. AITSON,
Petitioner,

v.

LINDA C. CAMPBELL, JACKSON D. HARAWAY, WILLIAM E. GOODMAN, JOSEPH J. MASSAD, JAMES R. DOUGHERTY, LINDA H. COMBRINK, TERRY D. GRUBBS, JAY L. KRUSKA, JAMES D. LIMESTALL, FRED D. LUCAS, JR., PHYLLIS TURLINGTON, and CYNTHIA VOGLER-HENRY, individually and THE MEMBERS OF THE BOARD OF REGISTERED DENTISTS in their official capacities,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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July 1, 1993

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18 pp

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July 1, 1993

COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

Whether, as held by the Tenth Circuit Court of Appeals, the members of a state professional licensing board are entitled to absolute judicial immunity from liability under 42 U.S.C. § 1983 for actions arising out of the exercise of adjudicative functions.

ADDITIONAL STATUTORY PROVISIONS INVOLVED

59 Okla.Stat. §§ 328.43-46

These statutes are set forth in the Appendix to this brief.

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COUNTERSTATEMENT OF THE CASE

This case arises out of the revocation of Petitioner Aitson's license to practice dentistry in Oklahoma. In January, 1991, the Respondents (other than Linda Campbell), acting as members of the Oklahoma Board of Governors of Registered Dentists, conducted an administrative hearing in which they heard evidence that Aitson had violated the provisions of previous Dental Board orders.

After hearing the evidence presented, the Respondent Board members voted to revoke Aitson's license.

Petitioner Aitson was not present at the January, 1991 hearing. However, the Dental Board's Executive Director mailed notices of the hearing to Aitson's last known business and residence addresses, according to Board records, as well as to several other addresses that had been obtained for Aitson. Under the terms of previous Dental Board orders, Aitson was obligated to keep the Dental Board informed of his current business and residence addresses.

Following the revocation of his license, Aitson filed a civil rights action in the United States District Court for the Western District of Oklahoma. Aitson sought declaratory and injunctive relief, as well as damages against the members of the Dental Board and its Executive Director. Aitson alleged that, in revoking his dental license,

the Respondents violated his constitutional right to procedural due process under the Fourteenth Amendment to the United States Constitution. The Respondents filed a motion to dismiss in which they argued, *inter alia*, that the Dental Board members were entitled to absolute immunity because the challenged actions were performed in their quasi-judicial capacity. The District Court converted the Respondents' motion to dismiss into a motion for summary judgment and granted summary judgment to the Respondents on all of Petitioner Aitson's claims.

On appeal, the Tenth Circuit reversed the District Court's granting of summary judgment on all of Petitioner Aitson's claims against the Dental Board's Executive Director and on his claims for declaratory and injunctive relief against the individual Board members. However, the Tenth Circuit affirmed the District Court's ruling that the individual Board members were entitled to

absolute immunity as to Aitson's damages claims. The Tenth Circuit remanded the case to the District Court, and the parties are currently pursuing discovery there.

However, although the case is currently pending in the District Court, Petitioner Aitson has requested this Court to grant certiorari on the issue of whether the members of a state licensing board are entitled to absolute judicial immunity for actions arising our of the exercise of quasi-judicial functions.

REASONS WHY THE PETITION SHOULD BE DENIED

I. BECAUSE THE SIXTH CIRCUIT DECISION RELIED ON BY PETITIONER AITSON HAS BEEN OVERRULED, THERE IS NOT A CONFLICT IN THE COURTS OF APPEAL THAT WARRANTS REVIEW BY THIS COURT.

In his Petition for Writ of Certiorari, Aitson contends that there is a conflict in the Courts of Appeal on the issue of whether members of state licensing boards are entitled to absolute immunity for actions arising out of the exercise of adjudicative functions. Aitson notes that both the First and Tenth Circuits have held that board members are entitled to such immunity, but maintains that the Sixth Circuit has reached a different conclusion. See Bettencourt v. Board of Registration in Medicine, 904 F.2d 772 (1st Cir. 1990) (absolute immunity applied where the defendant board members revoked the plaintiff doctor's license); Horwitz v. State Board of Medical Examiners, 822 F.2d 1508 (10th Cir.), cert. denied 484

U.S. 964, 108 S.Ct. 453, 98 L.Ed.2d 394 (1987) (absolute immunity applied where defendant board members suspended the plaintiff doctor's license); Manion v. Michigan Board of Medicine, 765 F.2d 590 (6th Cir. 1985).

However, Aitson neglects to inform the Court that the Sixth Circuit decision in Manion has been overruled. In Watts v. Burkhart, 978 F.2d 269 (6th Cir. 1992), the Court held that the members of the Tennessee Board of Medical Examiners, when sued individually for damages on a claim filed under 42 U.S.C. § 1983, were entitled to absolute, quasi-judicial immunity. The Court wrote:

> But except for Manion, the case law in this circuit and elsewhere is very clear: public policy requires absolute immunity for officials performing quasi-prosecutorial or quasi-judicial functions, at least where the protections such as those provided by the Administrative Procedures Act are in place, because of the likelihood that exposure to the 'burden of a trial and to the inevitable danger of its

> outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.'

978 F.2d at 275, quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), cert. denied 339 U.S. 949, 70 S.Ct. 803, 94 L.Ed. 1363 (1950). Accordingly, the Watts Court expressly stated, "[T]o the extent that the Manion decision is inconsistent with the views here expressed, the decision is overruled." 978 F.2d at 278.

In light of the Sixth Circuit's ruling in Watts, there is no longer a conflict in the decisions of the Courts of Appeal that warrants review by this Court.

II. THE TENTH CIRCUIT'S DECISION IS SUPPORTED BY DECISIONS OF THIS COURT.

Contrary to Petitioner Aitson's arguments, the decisions of this Court support the granting of absolute immunity for members of state licensing boards for

actions arising out of the exercise of adjudicative functions. In Butz v. Economou, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978), this Court expressly held that executive officers engaging in judicial acts were entitled to absolute immunity. This Court found administrative adjudication sufficiently analogous to the judicial process, such that the reasons supporting absolute immunity for judges were equally applicable to officials serving in a quasi-judicial capacity in administrative agencies.

Decisions by Courts of Appeal, such as Bettencourt, Horwitz, and Watts have followed Butz by applying a three part functional inquiry to determine whether particular executive officers function in a quasi-judicial capacity such that they are entitled to absolute immunity. These courts have asked: (1) whether a board member, like a judge, performs a

traditional adjudicatory function in that he or she decides facts, applies law, and otherwise resolves disputes on the merits free from direct political influence; (2) whether a board member, like a judge, decides cases sufficiently controversial that, in the absence of absolute immunity, he or she would be subject to numerous damages actions; (3) whether a board member, like a judge, adjudicates disputes against the backdrop of multiple safeguards designed to protect constitutional rights. See Bettencourt, 904 F.2d at 772. As noted above, the First, Sixth and Tenth Circuits have concluded that members of state licensing boards performed functions sufficiently analogous to judges to warrant a grant of absolute immunity.

In the instant case, the reasoning of Butz, Bettencourt, Horwitz and Watts supports the Tenth Circuit's decision

granting absolute immunity to the Respondent Dental Board members. Just as the judicial officers considered in those cases, the members of the Oklahoma Dental Board perform adjudicatory functions in determining whether to impose disciplinary action against individual dentists. The Board members hear evidence, make factual determinations, and apply legal principles to those facts. Moreover, as this case demonstrates, the members of the Dental Board adjudicate cases that are sufficiently controversial such that they are likely to result in actions for damages against them. Finally, just as the officers in those cases, a number of procedural safeguards apply to the actions of the Oklahoma Dental Board. Under the Oklahoma Dental Act, 59 Okla. Stat. §§ 328.1 et seq., dentists such as Petitioner Aitson are entitled to formal notice of the charges against them, the opportunity

to present evidence and arguments to rebut the allegations against them, and the right to appeal the Dental Board's rulings to the Oklahoma district courts and, ultimately, to the Supreme Court of Oklahoma. See 59 O.S. § 328.43-46.

Accordingly, the Tenth Circuit properly held that the Respondent Dental Board members are entitled to absolute immunity. Review by this Court is not warranted.

CONCLUSION

For the reasons set forth above, the Court should deny the Petition for Writ of Certiorari.

Dated, Oklahoma City, Oklahoma, July 1, 1993.

Respectfully submitted,

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APPENDIX:
59 Okla. Stat. § 328.43-46

§328.43. Appeals -- Jurisdiction and Venue -- Stays

Jurisdiction and venue for appeal from the decision of the Board of Governors shall be in the district court of the State of Oklahoma in all cases involving the revocation, suspension, probation or reprimand of license or certificate or the holder thereof as in this act provided. Notice of intention to appeal from a decision of the Board of Governors must be given at the time of announcement of such decision. Appellant shall have ten (10) days from the date of the decision of the Board of Governors in which to file his petition with the district court clerk of the county in which he resides, setting forth the grounds relied upon for such appeal and, on this date, appellant will forward a certified copy of the petition on file in such appeal, by registered mail, to the Board of Governors, at its offices in Oklahoma City, Oklahoma. Such appeal shall be heard by the district court and determined upon the record. Within sixty (60) days following receipt by the Board of Governors of the petition for appeal the Board shall cause said record of all proceedings and evidence appearing before it to be transcribed and filed in the district court. Such appeal shall not stay enforcement of the Board's decision unless the district court shall, upon sufficient hearing, determine that the public health will not be adversely affected by such a stay of enforcement pending outcome of such appeal. The Supreme Court of Oklahoma shall have jurisdiction of appeal from the district court and the rules of civil procedure govern such appeals.

APPENDIX A-2

§ 328.44. Hearings and investigations by Board -- Powers

In all cases involving revocation, suspension or probation or reprimand, the hearing shall be held in the county of the residence of the party charged or where the offense is committed. Upon the filing of a written complaint by any person, or upon its own motion when it has reason to believe a violation of the provisions of this act or of professional ethics has occurred, the Board of Governors shall have power to initiate and conduct investigations of all matters affecting or relating to the organization for its affairs, or the practice of dentistry, or the practice of dental hygiene, or the discipline of dentists or dental hygienists or any other matter within the jurisdiction of the organization; and in the conduct of such investigation the Board of Governors shall hear said complaint and shall have power to take and hear evidence touching the matters under investigation, administer oaths and affirmations, and upon such investigations, and upon trial or hearing of all matters, jurisdiction to try or hear which is given to said Board of governors, shall have power to compel the attendance of witnesses and the production of books, papers and documents pertaining to the matter under investigation, or to said trial or hearing, by subpoena issued as hereinafter provided. Whenever any persons subpoenaed to appear and give testimony or to produce such books, papers or documents as required by such subpoena shall refuse to appear or testify before said Board of governors, or to answer any pertinent or proper questions, he shall be deemed in contempt of said Board of Governors, and it shall be the duty of the presiding officer of said Board of governors to report the fact to the district court of

the State of Oklahoma in and for the county in which said investigation, trial or hearing is being held; thereupon the said court shall issue an attachment in the form usual in said district court, directed to the sheriff of said county, commanding said sheriff to attach such person and forthwith bring him before said district court. On the return of said attachment, and the production of the person attached, the said district court shall have jurisdiction of the matter, and the person charged may purge himself of the contempt in the same way, and the same proceedings shall be had, and the same penalties may impose, and the same punishment inflicted as in the case of a witness subpoenaed to appear and give evidence on the trial of a civil cause before a district court of the State of Oklahoma. Any member of said Board of Governors shall have power to administer oaths and issue any subpoena herein provided for. A subpoena may be served upon any person in Oklahoma, with the same fees and mileage by any officer authorized to serve subpoenas in civil actions, in the same manner as is prescribed by the code of civil procedure for subpoenas issued oft of the district courts of this state. No witnesses shall be compelled to attend a hearing outside of the county where such hearing is held. Depositions may be taken and used in the same manner as in civil cases provided for.

§328.45. Notice and opportunity to defend

Any person complained against, as herein provided, shall be given reasonable notice in writing by registered mail and have a reasonable opportunity and right to defend against a charge, so preferred against him,

by the introduction of evidence and the right to be represented by counsel and to examine and cross-examine witnesses. He shall also have the right to the issuance of subpoenas for attendance of witnesses to appear and testify or to produce books and records, as herein provided.

§328.46. Record of hearings

A record of all hearings shall be made and preserved by the Board of Governors.